No. 12,389

In The United States Court of Appeals

For the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellant,

vs.

M. W. MOUAT, as trustee of an express trust, M. W. MOUAT, and M. W. MOUAT as Administrator of the Estate of May Paula Mouat, deceased,

Appellees,

and

M. W. MOUAT, as trustee of an express trust, M. W. MOUAT, and M. W. MOUAT as Administrator of the Estate of May Paula Mouat, deceased,

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vs.

RECONSTRUCTION FINANCE CORPORATION,
a corporation,

Appellee.

Brief of M. W. Mouat, et al., Appellants

APPEARANCES:

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TOPICAL INDEX

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CAUSE NO. 12,389

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Appellants,

vs.

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellee.

JURISDICTION

The jurisdiction of the case was in the District Court, because as alleged in I and I-a of complaint, 2 R., the defendant, Reconstruction Finance Corporation was a United States Corporation, doing business in Montana, the matter in controversy exceeds $3,000, exclusive of interest and costs; the action arises under Act 47 Stat. 5, U. S. C. A., Title 15, Sec. 601, et seq., as amended 54 Stat. 574 U. S. C. A., Title 15, Sec. 613c, and under Judicial Code Sec. 24 U. S. C. A., Title 28, Sec. 41. Plaintiffs are citizens of Montana, residing at Billings, 4 R.

As to one original defendant, War Assets Administration, the action was dismissed, 45 R., by court order.

For clarity in this brief, we call cross appellants Mouats, and we use the well known initials, RFC.

The jurisdiction of the Mouats' cross appeal (we think the Court of Appeals has no jurisdiction of RFC's appeal, except to dismiss the same) before this Court appears: Title 28, Sec. 1291, U. S. C. A. ,

Judgment was entered June 11, 1949, 391 R. to 397 R., Mouats served and filed on June 18, 1949, motion to make additional findings. 397 R. to 399 R. This motion was not decided by the Court until Nov. 7, 1949, 418 R. The time to appeal was thus extended under Rule 73a and Rule 52b. Notice of appeal was filed Nov. 21, 1949, 419 R. A Surety Company bond was filed with the Notice of Appeal. Omitted from first record, certified copy by Clerk, now filed here. On November 25, 1949, 420 R. to 424 R., Mouats filed Statement of Points to be relied on, in the Cross Appeal. This Statement is adopted for the cross appeal. 429 R.

STATEMENT OF THE CASE

Complaint, 2 R. to 36 R., was filed Sept. 17, 1946. (The date should be remembered for the consideration of certain findings made, and refusal to find, as asked by Mouats.)

The claims alleged in the complaint: (a) May Paula Mouat is the trustee of an express written trust of date December 13, 1941; (b) During all of 1941 Metals Reserve Company was a United States Corporation doing business in Montana; (c) December 20, 1941, Mouats and Metals Reserve Co., for mutual considerations, executed a written lease, attached by copy, "Exhibit A," to complaint; (d) By Act of Congress, June 30, 1945, all assets of Metals Reserve, including Exhibit A, were transferred to RFC, and all liabilities of Metals Reserve placed upon RFC.

"EXHIBIT A," THE LEASE

This was for 10 years, with privilege of extension for 10 years more, on three patented and 23 unpatented mining claims and tunnel sites, locations dated from 1887 to 1941. "The Lessee may at any time after January 1, 1942, on ninety days notice to lessors and by the payment of One Thousand ($1,000) Dollars, surrender and terminate this lease, provided that, promptly after such termination, lessee shall pay all royalties accrued up to the effective date of such termination, any guaranteed minimum royalty payable to be pro-rated up to the date of such termination and no royalties shall accrue after the date of such termination, said payments to be made to the

Yellowstone Bank, Columbus, Montana, and to be paid by the said Bank to the aforesaid *Trustee.*" (Italics ours) 28 R.

"Upon the termination of this lease by either party, lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the lessors shall have the right to re-enter upon said leased premises owned by them and appurtenances and take full and complete possession of the whole thereof. Upon the expiration of this lease or the termination of this lease for any reason by either party, lessee shall have six (6) months' additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact *all* mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and *wooden buildings* erected upon the demised premises, and ore on dumps upon which royalties have not been paid." (Italics ours) 28 R.

"When this lease, for any cause, shall terminate, the lessee shall deliver to lessors a proper release or certificate of that fact, duly executed and acknowledged, and lessors, upon such termination, and after compliance with all of the terms, covenants and conditions of this lease, shall execute and deliver to lessee a release and discharge from all further liability hereunder." 29 R.

"Time is of the essence of this agreement and all of the grants, terms and covenants, stipulations and conditions expressed herein shall run with the land and in all respects

shall extend to and be binding upon the successors and assigns of the parties hereto." 29 R.

"It is mutually agreed that this lease is a Montana contract and shall be interpreted and construed under and by the laws of the State of Montana." 29 R.

"Lessee agrees with the lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased upon the termination hereof, for a period of more than *six months* after such termination, shall conclusively be deemed to have been *abandoned* by the lessee in favor of the lessors." 30 R. (Italics ours)

Returning to the allegations of the complaint: It is alleged that on November 15, 1945, RFC gave notice in writing to Mouats that the lease would be terminated February 28, 1946. The notice is set out in the complaint, and recites that the lessee "Does hereby surrender, terminte and cancel that certain lease dated the 20th day of December, 1941, covering certain mining property in Stillwater County, Montana." 6 R.

It is alleged: That the defendant has not delivered any release.

It is further alleged that the lease provided that "upon the termination of this lease by either party, lessee shall surrender peaseably the leased premises and appurtenances in good order, with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met, and the lessors shall have the right to re-enter upon the said leased premises owned by them, and appurtenances, and take full and complete possession of the whole thereof,"

but at no time since the 28th day of February, 1946, or before such date, have the defendants, or either of them, surrendered peaceably possession of the premises, or any part thereof to the plaintiffs or to either of them; the defendants, acting through servants whose names are unknown to these plaintiffs, have caused the front gate to the said premises to be manned by armed guards day and night; such guards have repeatedly forbidden the plaintiffs to enter the said premises without procuring a written pass, and such guards have ordered plaintiffs not to enter within a fence surrounding a large part of the said premises and surrounding all of the improvements thereon, and when permission has been given to the plaintiff, M. W. Mouat, to enter, he has been followed by guards, and by a sign forbidden to take within his own property described in the lease either a gun or camera. 10 R.

That the plaintiffs have demanded possession of said property on August 28, 1946. 10 R.

That defendants have further broken and failed to keep the terms on them binding of the said "Exhibit A." The defendants agreed to surrender the leased premises and appurtenances in good order upon the termination of Exhibit A. That at the time of the termination of Exhibit A, to-wit: February 28, 1946, there were seventy-nine separate residence buildings and one store building and one company barracks building, all fitted with modern plumbing fixtures and appliances. That the defendants, at exact times unknown to plaintiffs, but between the 28th day of February, 1946, and the date of filing this complaint, have committed waste upon the said premises,

and they have by means of servants and mechanics direct, or by contract with others, dismantled and removed all of the plumbing from the said buildings, though the same was affixed to the real estate and a part of the said buildings. That the defendants have carried away and converted to their own use all of the said plumbing fixtures and materials composing the same. That the said fixtures and plumbing articles taken from each of the said residence buildings was worth the sum of Five Hundred ($500) Dollars, and the whole thereof was worth the sum of Thirty-nine Thousand, Five Hundred Dollars ($39,500) taken from the said residence buildings. That the fixtures taken from the said barracks by the defendants were and are reasonably worth the sum of Fifteen Hundred Dollars ($1,500.00), and by reason of such acts of the defendants in forcibly removing and carrying off and converting to their own use, the said plumbing and fixtures, the defendants have committed damage and detriment to the appurtenances and to the property described in the lease in the sum of Forty-one Thousand Dollars ($41,000.00), no part of which has ever been paid. (The proof was 103 buildings; in findings of fact, 387 R.)

The plaintiffs pray for judgment for the rents, but as this is a matter of separate appeal, we do not go into that question in this brief.

The plaintiffs pray for $41,000.00 for waste as to the removal and conversion of the plumbing fixtures.

For the sum of $600.00 each for the destruction of twenty-two residence buildings.

That the defendants be ejected from the said lands

described in Exhibit A, and that plaintiffs be put in possession of all of the said lands.

The feature of the ejectment is not in either appeal. The trial court issued a Writ of Restitution, which was served shortly after the judgment was entered, and no appeal has been taken from that feature of the judgment.

The plaintiffs pray for such other and further relief as to the Court may seem meet and equitable. 14 R.

The answer of the defendant, RFC, is found 37 R., 44 R. The execution of the lease is admitted. The fact that May Paula Mouat was the trustee of an express trust is admitted to have existed at one time, but the defendant alleges no information or belief as to whether it presently existed. The defendant admits the allegations of the complaint as to the giving of the notice of termination of the lease. 38 R. The defendant admits that it has not executed a release or certificate of termination. 41 R. The defendant admits that on February 28, 1946, certain buildings and structures erected by Defense Plant Corporation were standing on the premises described in the lease.

Defendant admits that certain plumbing equipment was removed from said buildings, but alleges that removal was effected prior to six months from the time the lease was terminated and that removal thereof was authorized by the terms of the lease. 42 R.

Defendant admits that on February 28th and March 1st, 1946, there remained on the premises certain personal property of the type described in the complaint, which personal property was removed prior to August 28, 1946. Defendant denies that any materials so remaining were

removed therefrom subsequent to August 28, 1946. 42 R.

Defendant alleges that plaintiffs at no time had acquired any right, title or possessory interest in that tract of land described in the lease as an unpatented mining claim known as "Lake Placer," with certificate dated July 16, 1940, recorded in Book 23 Misc., page 400, and amended June 16, 1941, 24 Misc. 155. Defendant alleges that as to the area included in said Lake Placer claim, there has been a failure of consideration and that the terms of said lease are not applicable to any of the structures or facilities erected thereon. 43 R.

Defendant alleges that plaintiffs breached said lease by failing and refusing to deliver a quit-claim deed to 200 acres of land, at lessee's written request, for use by the lessee for mill sites, town sites, stockpilings and tailings disposal. 43 R. (We mention this defense, because the Court, in its findings, gives it consideration, and also gives it effect, but there was no evidence introduced at the trial that any request was ever made of the plaintiffs, or either of them, to deliver the quit-claim deed to 200 acres of land described in the lease.)

The Court allowed, over consistent objections, the defendant to introduce parol evidence, to vary the terms, or as was said, to "explain ambiguities" in the terms of the written lease. In the answer there is nothing putting in issue, or tending to put in issue, that the written lease did not mean exactly what it said. But on the contrary, the defendant admits the allegations in paragraph VI. of the complaint. 38 R. And paragraph VI., which is admitted without any qualification, alleges that on the 20th day of December, 1941, Metals Reserve Company, and

plaintiffs, for mutual considerations, entered into the lease, copy of which is marked "Exhibit A," and attached to the complaint.

THE EVIDENCE

We shall attempt to separate for this appeal, the evidence which pertains to it alone, as distinguished from the appeal of the RFC.

Mrs. Mouat had lived close to the land in the lease for thirty years, and was acquainted with it. About a year and a month before the trial, which began Novemebr 12, 1947, she wished to visit the upper portion of the land with some friends. The land would be reached from her house up the main road. She was traveling in a car. A chain across the road obstructed her, and the chain was locked. 50 R.-51 R. That was the only way that a vehicle could get to the land. 52 R. There has never been any change in the trust agreement. 52 R.

On August 28, 1946, Mrs. Mouat told the guard: "We are taking possession. Their time was up." 53 R. In the next day or two she saw a notice posted there that referred to Bill Mouat. The notice said they would not let anyone—they said that he could not go through with anything but a pickup and himself, not a man could go through, and the guards followed him when he did go through. 54 R. She identified Bill Mouat as one of the plaintiffs. The chain was a heavy chain that she could not actually get by physically. 57 R.

TESTIMONY OF MALCOLM WILLIAM MOUAT

The difference in elevation between the Mouat house and the camp, a mile up the hill, is 1,900 feet. 62 R. About the first of September, 1946, Mouat sought entrance at the lower gate with Mr. Colton, Mr. Shone and Mr. Maury. 62 R. He could not get his friends through that gate without considerable trouble, an hour. 63 R. Then, when they were allowed through, they were followed by a guard, the guard stopping some distance behind when they stopped. 64 R.

A map was introduced showing the exact number of buildings on the leased premises. 66 R. To the left on the line on the map is the land that was in the lease, and it shows the number of buildings that were placed upon this land, and standing there when the lease was terminated on February 28, 1946.

Nicely for RFC.

The number of these buildings was 103. 238 R. 239 R. The buildings were on cement abutments and the frames were made of wood. The flooring was of wood. The roof was of wood. 69 R. 21 of the buildings were removed in August, 1946, or prior thereto. 233 R. Nicely in charge was working for *RFC from January, 1944 to Sept. 1, 1946.* R. 232. From the remainder "the wallboard has been taken out and some electrical fixtures have been disconnected, and the plumbing has been removed." 233 R.

The value of each of the 22 buildings removed was at least $400.00, according to Mr. St. John (for RFC). 265 R. 266 R. The total value of the plumbing, etc., after removal from the leased premises was, according to Mr. St. John (for RFC), $11,795.52. 272 R. The cost

of restoration to the condition of March, 1946, in all of the buildings on the leased land according to Mr. St. John, was $90,000 to $95,000. 276 R.

The estimates are higher from Mouats' witnesses. Partly with the purpose of getting a final decision in the Court of Appeals on certain claims, we moved for additional findings. 397 R. These went to the strip of the buildings on the leased premises and conversion of the fixtures; the reasonable cost of replacing same, 398 R., $90,000; the removal of 22 houses of the value of $15,300.

The opinion of Judge Pray is found 357 R. to 367 R. Findings of Fact and Conclusions of Law were made in accord with the opinion, June 11, 1949. 378 R. to 391 R. Judgment was entered June 11, 1949, 391 R. to 397 R. This awarded the plaintiffs certain rentals to the date of the trial, also possession of the lands described in the lease. The gravamen of Mouats' appeal is: (because)

"It is adjudged that defendant, Reconstruction Finance Corporation, a corporation, is the owner, and entitled to the possession of all houses, buildings, or structures situated, and being upon the Lake Placer Mining Claims and without requirement of immediate removal." 396 R. Such being the decision as to the buildings, the judgment is silent as to strip of them, or sale of some of them.

It pertains more to RFC's appeal than to Mouats' appeal, but we may mention here that while Mouats' motion of June 18, 1949, for additional findings, was pending, and before notice of appeal was filed by either party, the defendant also moved to re-open final judg-

ment, and further moved that the "findings of fact and conclusions of law be amended to conform with such additional proof, and that judgment be entered accordingly." 399 R.

On August 9, 1949, RFC filed Notice of Appeal. RFC was still pressing its motion to amend the judgment on September 27, 1949. 415 R. Mouats were pressing their motion for additional findings on September 27, 1949. 415 R. Both motions were denied November 7, 1949. 417 R. 418 R.

SCOPE OF MOUATS' APPEAL. 419 R.

This is from parts only of the final judgment:

1.

From:

That portion of said judgment wherein "It is adjudged that defendant, Reconstruction Finance Corporation, is the owner, and entitled to the possession of all houses, buildings, or structures situated, and being upon the Lake Placer Mining Claim and without requirement of immediate removal."

2.

Wherein the said judgment fails to adjudicate that the said plaintiffs were entitled to a judgment for any sum of money at all for waste as to the removal and conversion of the plumbing fixtures of buildings on the Lake Placer, and other strip and waste by destruction of buildings, removal of fixtures, removal of buildings, and all waste committed at the leased premises by defendant.

3.

Wherein the said judgment fails to adjudicate that the plaintiffs were entitled to Six Hundred Dollars each, or any sum, whatever, for the destruction of twenty-two residence buildings on the said Lake Placer.

The Mouats served and filed on November 25, 1949, Statement of Points to be relied on by plaintiffs' cross appeal. 420 R. This is adopted for this appeal in the Court of Appeals. The Specifications of Error are numbered in accordance with the numbering of that statement, and each (except Specifications 6 and 7, which require, under the rules of this Court, a statement as to the evidence introduced and objected to), is almost in the words of the statement.

SPECIFICATION OF ERRORS

1.

The written lease from plaintiffs to Reconstruction Finance Corporation (Metals Reserve Company), provided: (a) "Upon the termination of this lease for any reason by either party, lessee shall have six (6) months additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties, and all excavations, foundations, wooden mine structures, wooden tramway towers, and wooden buildings erected upon the demised premises * * * ." Lessee terminated the lease by written notice February 28, 1946; there were then standing on the leased premises 81 wooden buildings with plumbing and lighting fixtures; before August 28, 1946, lessee extracted

and converted plumbing and fixtures from all these buildings, and converted the same to its own use. (The specification filed has a mistake. There were actually 103 buildings as the Court found. 387 R.)

Cross-appellants assert that the Court erred in finding that these buildings were the property of Reconstruction Finance Company after February 28, 1946.

2.

Cross-appellants assert that Court erred in not giving them judgment for at least the lowest value named in the evidence of 22 of these buildings removed by lessee before suit brought, to-wit: $400.00 for each, total $8,800.00.

3.

Cross-appellants assert that Court erred in not giving them judgment for at least the lowest value of the plumbing and other fixtures removed by lessee after February 28, 1946, and before complaint filed, September 17, 1946, i. e., $11,795.52.

4.

The lease provided that it should be construed by Montana law. The Court erred in not giving the landlords judgment for $90,000.00, the lowest estimate in the evidence of the necessary cost of replacement of the plumbing and fixtures in the buildings.

5.

This suit was commenced more than six months after lessee terminated the lease; 81 buildings (though fixtures

extracted) were standing on the premises at the trial. The lease provided: "20. Lessee agrees with lessors that unless there is an understanding to the contrary in writing, anything remaining on the premises herein demised and leased, upon the termination thereof, for a period of six months after such termination, shall conclusively be deemed to have been abandoned by the lessee in favor of the lessors."

The Court erred in adjudging that these buildings were not the property of cross appellants.

6.

The Court erred in permitting the lessee to introduce parol evidence to vary or explain the written contract, for that it is plain on its face; for that neither its validity, as written, nor any variance from its plain meaning, was put in issue in the answer.

THE EVIDENCE OBJECTED TO

(Testimony of John Edward Norton.)

"Q. I believe you said that in December, 1941, you proceeded to the area of Billings, Montana, and negotiated for a lease?

A. Yes.

Q. With whom did you conduct those negotiations?

A. Mr. William Mouat, Bill Mouat.

Q. That is the plaintiff in this case?

A. Yes.

Q. Did you have any negotiations with Mrs. Mouat?

A. Yes, Mrs. Mouat took part.

Q. At the time you were negotiating with respect to the lease, was there any discussion of the meaning of the language in paragraph 15, which is as follows,

and I am now reading from the lease which is an exhibit to this case?

"Upon the expiration of this lease or the termination of this lease for any reason by either party, lessee shall have six (6) months additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timbering, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and wooden buildings erected upon the demised premises, and ore on dumps upon which royalties have not been paid."

A. Yes, there was a discussion about that.

Q. Was the discussion about what the meaning of wooden buildings would be?

A. Yes, the whole paragraph was carefully discussed. I came out here the first time, the date you said, in June, 1941, for the purpose of getting the lease from Bill Mouat. Of course, at that time we discussed it and Bill agreed to give a lease.

A. Bill agreed to a lease similar to the one that the other chrome property—

A. (Witness): Well, there were no maps of these mining claims available that you could tell just where they were or what they were, and I went over the property with Bill Mouat. I was here for a period I guess all-told of seven or eight days, and there

were no maps to the property that I could definitely say what mining claims we wanted or what, so an abstracter was hired and he went to the courthouse—

A. (Witness): All right. We discussed this proposition and we did it referring to the proposition of the construction work right at the mine sites, and that there would have to be townsites built, and there were townsites being built at this property, and that is the reason we wanted 200 acres of land deeded to us because the Government wanted title to all of the land on which they put the townsites and millsites.

Q. (By Mr. McKevitt): Did you have any particular discussion with respect to the meaning of the term wooden buildings, as set out in the lease?

A. In paragraph 15 we had discussions, quite a few of them, that that paragraph meant structures erected at the mine sites. By mine sites we meant sites where you went in the ore body and opened up to develop the ore body.

Q. In other words, was there anything in that discussion which would indicate that that term wooden buildings would mean houses to be built at the townsite, at the mine sites, the tram sites or shaft sites, whatever we would need to open up and mine that ore.

Q. And at the same time this other provision was put in the lease for creating free land for construction of the mill sites and town sites?

A. Mill sites and townsites there was a paragraph there the Mouat people would deed 200 acres of land.

The objection to this testimony is found 214 R.

"Mr. Maury: We object. It is not material. The lease was finally negotiated and finally admitted to be the genuine lease, and any prior negotiation is not relevant in this case.

A long argument followed and is abbreviated on pages 215 R., 216 R., 217 R., 218 R., 219 R., 220 R.

Mouat's exception is noted 221 R.

The objection was actively and fully pressed. The Court certainly was well advised as to the nature of the objection. He makes a remark during the argument as follows:

"There can be no ambiguity of a wooden building. No man can testify something that is a wooden building is meant not to be a wooden building, any more than a man can say a rocking chair is not a rocking chair." 215 R.

Another remark of the Court breaks the argument:

THE COURT: "Why didn't they put it in the lease while they were about it?" 218 R.

The only other testimony to vary the terms of the contract is as follows:

ARTHUR S. HUTCHINSON, a witness for RFC on the stand.

Q. "Mr. Hutchinson, do you agree with the testimony—

MR. MAURY: We object as not a proper question—do you agree with the testimony of a certain witness? He can give his own testimony.

Q. Do you agree with the testimony given in this case

yesterday by the witness John Norton, with respect to conversations had with Mr. Mouat at the time the lease involved in this case was being negotiated?

A. I do.

Q. And you are the Mr. Hutchinson who was present the *the* negotiations for the lease involved in this case?

A. Yes.

Q. Mr. Hutchinson, did you have any conversation with Mr. Mouat at the time with respect to including the word 'townsite' in paragraph 22 of that lease?

MR. MAURY: We object as an attempt to vary the contents of a written document that has not been put in issue in this case; it has been agreed to in the answer as being the exact copy. 295 R. 296 R.

THE COURT: Yes, I said I would let them show their theory of it and we will see what they are trying to do; whether they will succeed or not will depend on what the court concludes later on. It will be received subject to objection.

MR. MAURY: All of it along this line.

THE COURT: Yes, all of it.

Q. Mr. Hutchinson, did you have any conversation with Mr. Mouat at the time with respect to including the word 'townsite' in paragraph 22 of that lease?

A. I was present during negotiations.

Q. Would you answer that yes or no?

A. Yes, I was present during the negotiations which were conducted primarily by Mr. Norton with Mr. Mouat.

Q. Would you repeat the substance of that conversation with respect to including the word 'townsite' in the lease, paragraph 22 of the lease?

A. Well, in June of 1941, Mr. Norton was out here and negotiating with Mr. Mouat for a lease. That lease was not acceptable to Reconstruction Finance Corporation, but I used it as a form for preparing the lease in evidence. That lease of '41, among other things, provided—

MR. MAURY: We object to any statement of the contents of that lease unless the lease is here.

THE COURT: Confine your answer to this particular question.

A. Well, Mr. Norton informed Mr. Mouat that more than one townsite, more than one mill site, more than one tailing disposal, and such matters, would undoubtedly be required, and it would be necessary to put all of those terms in the plural in this lease that is in issue.

Q. And how much land did you ultimately decide would be needed for the townsite and mill site purposes?"

The cross-examination, which is very long, shows that a prior proposed lease of six months before the execution of the present lease had substantially the same paragraphs in it that the present lease has. 299 R. 300 R. (But we are drifting into argument.)

7.

The Court erred in permitting the lessee to introduce evidence to impair or dispute the lessors' title to the Lake Placer, one of the 21 mining claims demised.

This was RFC's Exhibit No. 26, a decision of the Acting Land Manager in a contest of the United States against the Mouats. Nothing but the closing paragraph of this seems germane here. This is:

"The preponderance of opinion among the expert mining men and engineers in this case is 'that a prudent man would not be justified in spending time, money and effort in the hope of developing a paying mine, and I so decide'." 327 R.

One objection was that this was not final, that appeal would be taken. (This was taken, the case was remanded for further proceedings by the Secretary of the Interior.) 377 R.

MR. MAURY: We object to the introduction of the exhibit in evidence for the reason that it is not permitted in Montana for a tenant to in anywise impeach the landlord's title after the tenant has once taken possession of the land under the lease. That the action is upon a written lease which has not been put in issue in the pleadings, but which has been admitted. The evidence conclusively shows that the tenant did take possession under it and maintained possession under it, and that the present tenant is under the same liabilities and duties by Act of Congress as the original tenant, the Metals Reserve Company. And, further, that in this very lease there are statements that the lessee would defend and sustain the title to any property that was not held by patent, but that was held by location, and that this property was held, it shows was held by location and—

MR. LAMB: What paragraph is that, Mr. Maury?

MR. MAURY: I will get them for you and I will

show you. 15 is one of the places. "Upon the termination of this Lease by either party, Lessee shall surrender peaceably the leased premises and appurtenances in good order with all payments and obligations for maintenance thereof and for the maintenance of possessory claims and rights and permits fully met."

MR. MAURY: That is one of the places that they promised to maintain the possessory claims, but that is not at all necessary. There are two other places. Now in para-12; the Lessee agrees that it will defend the said leased property. In paragraph 13 the Lessee says: "and Lessee shall, nevertheless, make and comply with all obligations and payments for the maintenance of the demised premises and possessory rights, claims and permits up to the said time of re-entry by Lessors." In three places in this lease, but regardless of that, that is not the law.

A special Use Permit of the U. S. Forest Service embracing this land was received in evidence. It was to Defense Plant Corporation. It appears 331 R. to 347 R., paragraph 31 is perhaps germane:

"31. It is expressly understood that when the Metals Reserve Company takes over the interest of the Federal Government in development and/or operation of the chromium mining operations on the so-called Mouat properties in the Stillwater River drainage in Stillwater and Sweetgrass Counties, for which the Defense Plant Corporation is now responsible, the term 'permittee' as used herein, shall be construed to mean Metals Reserve Company instead of Defense Plant Corporation; and the obligations assumed hereunder by the permittee and by

the Forest Service, shall remain the same as if the permit had originally been issued to the Metals Reserve Company. But this construction of the word 'permittee' shall apply only to the Metals Reserve Company; and the transfer of right, title or interest in or to the structures or facilities for which this permit is issued to any other person, organization, or thing shall terminate this permit.

The objection is as follows:

MR. MAURY: We object to the introduction of this instrument as being an attempt by the lessee and its legal successor to impeach the title of the landlord under the lease which has not been put in issue, and also that it is a well-known fact or law rather, that this forest reservation, when erected, reserved to all persons who wanted to enter that reservation for the purpose of mining and milling, and location of mining claims, a right to do so; that that is in all forest reservation enactments, and in the papers erecting the forest reservations in Montana, and that this special use permit is too indefinite to be held to apply to this particular placer location, and that this is one of the things that the lessee promised to sustain."

Exception noted 330 R.

(Specifications 8, 9, 10, 11, 12 following were on the refusal of the Court to grant the Mouats' motion to supplement the findings made after the judgment was entered. One purpose of making this motion was to have the record in such shape that if the Court of Appeals should find that the Mouats were right in their contention about the ownership of the buildings, the Court of Ap-

peals could order final judgment in their favor. We think the Court should have made these findings.)

8.

The Court erred in not finding more fully on the facts as requested in cross-appellants' motion so to do, served and filed within 10 days after entry of judgment, to-wit: June 18, 1949.

9.

The Court erred in not finding specially that the defendant did not leave intact the foundations or wooden buildings upon the demised land, but while wrongfully holding possession from plaintiffs after March 1st, 1946, and previous to September 1, 1946, without plaintiffs' consent, tore out from, and stripped the said buildings of all plumbing in place, some wiring in place, some doors and windows and oil storage tanks in place, and pipes appurtenant, and carried off of the demised land the said plumbing, wiring, oil storage tanks, piping, doors and windows and oil storage tanks in place, and 423 R.

10.

The Court erred in not finding specially that the reasonable and necessary costs of replacing the said plumbing, wiring, doors, windows, oil storage tanks, and pipes appurtenant thereto, was, and is the sum of Ninety Thousand ($90,000) Dollars. 423 R.

11.

The Court erred in not finding specially that the defendant, without plaintiffs' consent, between March 1st

and September 1st, 1946, removed from the leased premises, and converted to its use, one house of the value of $600.00. 423 R.

12.

The Court erred in not finding specially that the defendant, without plaintiffs' consent, permitted a third party, after September 1st, 1946, and before the hearing herein, to remove and convert to its own use, and such third party did remove and convert to its own use, and use of said defendant, from said premises, twenty-one houses of the value of Seven Hundred ($700.00) Dollars each—a total of Fourteen Thousand, Seven Hundred ($14,700.00) Dollars. 424 R.

CHANGE IN PARTIES

On January 1st, 1950, May Paula Mouat died. Suggestion of her death was made. Exemplified copies of orders of the proper state court appointing M. W. Mouat trustee in her stead, and administrator of her estate have been filed with the Clerk of the Court of Appeals. Order has been duly made that M. W. Mouat, administrator, be substituted for the person May Paula Mouat, and that M. W. Mouat, trustee, be substituted for May Paula Mouat, trustee; cross-appellants, and appellees.

ARGUMENT AND AUTHORITIES

No ambiguity, or variance from clear meaning of the words of the lease was put in issue by the answer. An attempt was made by RFC to prove that the words "wooden buildings," found in a paragraph of the lease, was by agreement made with M. W. Mouat *before execu-*

tion to have a meaning different from "woden buildings." This was, we think, like the impossibility suggested by Mr. Justice Holmes that where parties to a written contract use the words "Old South Church," parol evidence should not be received to the effect that they meant the "Bunker Hill Monument."

But there was no attempt made to explain away another clause; paragraph 20, 30 R. is to the effect that unless there is an understanding to the contrary in writing, anything remaining on the premises for more than six months after termination, "shall conclusively be deemed to have been abandoned by the lessee to the lessors."

When the lease expired there were present on the land 103 wooden buildings. Findings of fact R. 387. (The Court calls them *wooden* buildings.) Time was of the essence. Finding XI. R. 386. Twenty-two were removed before September 1st, 1946, i. e., during the last week of August, 1946. Testimony of Nicely for RFC, 233 R. A map, Exhibit 1 for Mouats, shows 81 of these buildings were standing at the trial. This is not disputed. Suit was begun after the six months expired. We submit that these buildings still standing on the leasehold, are the property of Mouats, and the part of the judgment, 396 R., awarding them to RFC, should be reversed with positive direction to enter judgment that Mouats are the owners of all buildings standing on the property on September 1st, 1946.

THE ATTEMPT TO VARY THE PLAIN MEANING OF THE LEASE BY PAROL EVIDENCE

The provision that buildings erected upon land by a tenant shall, at the termination of the lease, become the property of the landlords, is often inserted in mining leases in the Western States. The Court, in its opinion 365 R., gets aid for its findings that it was not the intention that the wooden buildings became Mouats' in the provisions of the lease that Mouats would, upon written request, by deed quitclaim land not exceeding 200 acres, for townsite and other purposes. But Norton for RFC says: "It was our idea that this 200 acres was deeded, and that that would not be on any land covered by the lease * * *." 230 R.

It would be strange if the 200 acres could be carved out of the leasehold. Were that the true intent, the 200 acres could have been placed over any or all chrome deposits that RFC decided to work, and no royalty above the minimum paid, and then the lease could have been terminated for $1,000. The RFC would have the mines for the $1,000 and the minimum royalty for the time required to make the demand and write the quitclaim deed.

The question about the effect of the promise to, *on written request,* quitclaim 200 acres, seems to be a moot one. No request appears in the evidence to have ever been made. Such is also a Court finding. 363 R.

The opinion 365 R. says that it does not seem reasonable to assume, in the absence of clear and unmistakable

language to that effect, that officers and boards of the government would undertake the expenditure of such large sums for homes of their employees with the intention of making a present of such property to lessors upon the termination of the lease, etc.

We think the Courts may only construe the contracts made, not act on what they think the Boards intend to do. Besides, *the Mouats' intentions* are also to be considered. Judge Pray candidly says: "This question is important, and the higher Court may find a different solution." 366 R.

We think Judge Pray's first remark about this line of proof is as refreshing as Judge Holmes' famed analogy. We hope to convince this Court that no witness may say "a rocking chair is not a rocking chair," but we also hope to show the Court that there is not any valid evidence that the parties ever intended that wooden buildings mean something else.

Perhaps no analysis is needed of the evidence of Norton and Hutchinson that during preliminary negotiations, "wooden buildings" meant something else in conversation with Bill Mouat. These took place at Billings. Mrs. Mouat was 90 miles away near the mines. M. W. Mouat's signing the lease at all, may have been of slight importance. A dozen were beneficiaries of the trust to May Paula Mouat. The royalties were all payable to the Columbus Bank, to be paid by the Bank to May Paula Mouat *as trustee*. 22 R.

Norton was asked:

"Now, just what exactly did you tell Mrs. May Paula Mouat?

A. Oh, Mrs. May Paula Mouat, I don't remember that we told her very much." 230 R.

Hutchinson details all the conversation he had with Mrs. May Paula Mouat. It was after the contract was typed, they had driven 90 miles. Not a word pertained to wooden buildings or to the contract's having an occult meaning.

Mrs. Mouat denies that she had any conversation with Hutchinson about any wooden buildings. 348 R.

She said she relied on her attorneys, Judge Goddard (once Chief Justice of the Montana Supreme Court), and Ex-United States Senator Myers. They were both dead. 348 R.

What they would have said if alive, about a different meaning for "all * * * wooden buildings" from the vernacular, having been agreed on, is a mystery. (Or is it? The negotiations had been going on six months; days and nights of work and words preceded its final draft.) It is not credible that Hutchinson, Dwyer, Goddard, Myers, would permit the omission from the contract of a parol agreement, altering a plain meaning of words used, if such agreement was founded on fact. Titles in Montana to valuable property do not exist only in the frail memories of visiting lawyers.

M. W. Mouat denies that there were any conversations with Norton or Hutchinson about buildings that might be placed on the land under the lease before the Court. 351-352 R.

UNDER CONTRACT, THE GOVERNMENT AND PRIVATE CITIZENS ARE ALIKE IN THE COURTS

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Lynch v. United States, 292 U. S. 571, 78 L. Ed. 1434, at p. 1440 in L. Ed.

In the footnote to the opinion written by Mr. Justice Brandeis, there are cited eleven cases from the Supreme Court itself, and going back to 15 Peters.

"The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State, or a municipality, or a citizen."

Lynch v. United States, 78 L. Ed. at page 1441 of L. Ed.

"The rule that a contract is to be construed most strongly against the party preparing it, is well settled, and applies to the Government in a case like this, as well as to an individual."

United States v. Newport News Shipbuilding Co., CCA 4th, 178 Fed. at p. 200.

"The supplementary agreement is signed by General Butler, and not by the plaintiff. Its doubtful expression should, therefore, according to the well-settled rule, be construed against the party who uses the language."

Garrison v. United States, 7 Wall. 688, 19 L. Ed. 277.

> "When the United States Government, or any branch thereof, enters into a contract with an individual, natural or corporate, it does so in its private or business capacity, and not as a sovereign, and submits itself to the same rules of law that govern contracts between individuals."
>
> Fed. Digest 68, at page 262, key No. 70 (1).

Under this quotation are eight cases cited. As to leases, according to this Digest:

> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances, will be implied against them. Thus, when they take a lease of real property, they are subject to the same implied obligation not to commit waste as would be raised against an individual tenant."
>
> United States v. Bostwick, 94 U. S. 53 ; 24 L. Ed. 65.

The form of this lease was in use by the Metals Reserve Co. previously. Hutchinson, "* * * I used it as a form for preparing the lease in evidence." 296 R.

The record shows that in a lease talked of in June preceding this one of December, there was an identical provision as to leaving intact wooden buildings, and ore on dumps on which royalties have not been paid. In the inchoate lease of June the same provision appears as to "anything remaining on the premises * * * for a period of six months after such termination, shall conclusively be deemed to have been abandoned by the lessee in favor of the lessors." 299 R. 300 R.

It was evidently used as the structure of the lease from

the owners of the Ben Bow Chrome Mines. Testimony of Norton for RFC, 228 R.

There must be *mutuality* of intent to vary the meaning of a written contract from the plain meaning. Norton and Hutchinson speak only of what *they* intended and what *they* said to Mouat about the meaning of the contract. They are silent about whether Mouat said anything to them about a mysterious meaning being agreed to for "all wooden buildings." Mouat's communications to Norton and Hutchinson seem only that "Bill agreed to a lease similar to the one that the other chrome property" —(interrupted). 222 R.

There is no evidence that by a *custom* or *business usage,* wooden buildings erected in a mine development means only such as house, machinery, etc.

> "The natural, obvious meaning of the provisions of a contract should be preferred to any curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind would discover."
>
> Hawkeye Com. Mng. Assn. v. Christy (CCA 8th) 294 Fed. 208.

This contract was agreed to be construed by Montana law.

The parol evidence rule is one of substantive law. A different rule would soon render instruments in writing of no value, and the temptations to commit perjury would be increased. Parol testimony is not excluded because of no probative value, but because it is against the policy of the law that written contracts should be overturned in that manner. Even if the evidence is admitted without

objection, the same rule applies. (Paraphrased from)

Bauer v. Monroe, 117 Mont. 306; 158 Pac. 2nd, 485 (May, 1945).

The Court below attributed some force to the silence of Mouats while the buildings were being placed on this land. The record is silent as to whether or not the Mouats were silent. What right did they have to protest? About the parol evidence rule in an entirely different kind of contract and about silence in a contract, the Montana Court says: "To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

Rose v. Emerson-Brantingham Co., 61 Mont. 73; 201 Pac. 316.

The Statute of Montana:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore, there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings.
2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in Section 93-401-17, or to explain an intrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties."

93-401-13 RCM, 1947. 10517 RCM, 1935.

The reason for the rule that to dispute the plain meaning of a written contract, the defendant must tender an issue about it, is to permit the plaintiff to meet the contention with evidence. It is a rule of general law as well as by statute in Montana.

Riddell v. Peck-Williamson Co., 27 Mont. 44; 69 Pac. 241.

Courts may not force an ambiguity into a plain contract for the purpose of interpreting it against a party to it.

Southern Surety Company v. McMillan Co. (CCA 10th) 58 Fed. (2nd) 541;

U. S. F. & G. Co. v. Guenther, 281 U. S. 34.

AMBIGUITY

Contemporary construction by acts of the parties must be the acts of both parties.

Kane v. Schuylkill Ins. Co. (Pa.) 48 Atl. 989, quoted in Sternberg v. Brook (Pa.), 74 Atl. 166, 133 Am. St. Rep. 877.

NOT PERMITTED TO INJECT WORDS INTO A CONTRACT

It never is required, and cannot be permitted, where the injection of additional phraseology narrows the apparent general purpose, and defeats what, except for the addition, would be both a reasonable and a just result.

Ingersoll v. Coram, 127 Fed. 418.

ONE CANNOT PROVE A MERE PRIVATE UNDERSTANDING

Williston, Vol. 3, p. 1757, p. 611.

NOR CREATE AN AMBIGUITY AND THEN ADMIT PAROL TO EXPLAIN IT

Williston, P. 610.

Hunt Triplex Safety Glass Co., Fed. (2nd) 92.

"Before a writing may be reformed to express the real agreement of the parties, *the parties must have agreed.*" (Italics ours)

Moffat Tunnel Improv. Dist. v. Denver & S. L. Ry. Co., 48 Fed. (2nd) 715.

"To permit a party to enlarge the obligation of a solemn written contract, deliberately entered into, by the character of parol proof relied upon in this case, would destroy the sanctity of written contracts, and set at naught the very purpose which actuates honest persons when they reduce the terms of their contract to written form."

Southern Surety Co. v. U. S. Cast Iron Pipe & F. Co., (C. C. A. 8th) 13 Fed. 2nd 833, P. 839.

INTEGRATED

10519. "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

10525. "When the terms of an agreement have been intended in a different sense by different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and

when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

Parol evidence that parties did not intend to include buildings described in a bill of sale, is inadmissible.

Hogan v. Kelly, 29 Mont. 485; 75 Pac. 81.

"There is a witness in this case that is not discredited by any fact or circumstance, has an unfailing memory, and has no interest in the outcome of the case, and that is the deed. No suggestion arises from reading it that the parties had any intention other than that which it clearly expresses."

Humble v. St. John, et al., 72 Mont. 519; 234 Pac. 475.

"A 'building' is defined as 'a fabric or edifice, framed or constructed, designed to stand more or less permanently, and covering a space of land for use as a dwelling, storehouse, a factory, shelter, etc."

University City, Mo. v. Home Fire & Mar. Ins. Co., 114 Fed. (2nd) 288 (8th CCA.)

"The term is not confined to structures of any particuar size or shape." idem.

"The general rule is that an insurance contract on a 'building' covers all the inseparable and constituent parts thereof."

BUILDING INCLUDES ALL INTEGRAL PARTS

"The reason for the rule that insurance on a 'building' must be held to cover all the constituent parts thereof, is aptly expressed in Prussian Nat. Ins. Co. v. Terrell, supra. (142 Ky. 732, 135 S. W. 419), as follows: 'It must be borne in mind that a

description in a policy of the building insured is never accompanied, or intended to be accompanied, by the particularity of an architect's plans and specifications. The purpose of the description is simply to identify in a general way, the building insured. Because the description fails specifically to include any particular portion of the building is no reason why that portion should be excluded from the operation of the policy. Any other rule would lead to endless confusion and all sorts of frivolous pleas and contentions. The courts would be called upon to say whether or not a bay window, a back porch, or a bathroom was included in the policy which simply described in a general way the building of which they were a part at the time the insurance was obtained. The result would be that, unless a man took the care to describe with particularity each and every portion of the building insured, he would never know what his rights were under his policy; while an insurance company would always have some plausible pretext upon which to resist payment of the policy."

SPECIFICATION 7
DISPUTING LESSOR'S TITLE

After this suit was started, the defendant attempted to get part of the case decided by the Bureau of Land Management, and to thus withdraw jurisdiction as to part of it from the Court. The buildings are on the Lake Placer, which is a mining location not yet patented. The defendant had agreed in the lease that it would defend and sustain the title to any property that was not held by patent, but that was held by location, and that at the termination of the lease, it would surrender peaceably the leased premises and appurtenances in good order, with all payments and obligations for maintenance thereof, and

for the maintenance of possessory claims and rights and permits fully met.

The defendant offered in evidence a decision of the acting Land Manager in a contest of the United States vs. the Mouats, involving the Lake Placer location. The plaintiff objected that this was an attempt to impair or dispute the landlord's title, which could not be done after the defendant had gone into possession and enjoyed peaceable possession until the lease expired. The plaintiffs also objected that this decision was not final; that appeal would be taken; that the time to appeal had not expired. This appeal was taken to the Secretary of the Interior, and the case was remanded for further hearing. A certified copy of the decision of the Secretary of the Interior was presented to the Court before decision and ordered filed, 368, 369 R., so that on the present record the question may be moot. No further decision of the acting Land Manager appears since the order remanding the case; however, we think the question should be set at rest and answered by this Court for its effect on any future proceedings, that may result if the Mouats' contentions as to the buildings are found by this Court to be correct. These Government agencies stand no higher before the law than the United States. This agency agreed that it would be bound in the construction of this contract by Montana law. When the United States enters into a lease, then they are subject to the same implied obligations not to commit waste as would be raised against an individual tenant.

U. S. v. Bostwick, 94 U. S. 53, reversing Lovett v. U. S., 9 Ct. Cl. 479.

Estoppels similar to that against the tenant to deny the title of the landlord are enforced in contracts for personality, as well as in leases of real estate, and these are enforced against the United States. The United States is not allowed to sink in its business dealings below the standards of business honesty.

> "The other objection relied on by the government in this case is, that the claimant had no valid title to the steamer as against the United States, having obtained her from the Confederate Government in 1863, in payment for supplies furnished to the Quartermaster's Department of that government. This objection cannot be sustained. When the contract was made with the claimant, the vessel was in Mexican waters, and not subject to the jurisdiction of the United States. The claimant was applied to for its use. It was agreed that he should be compensated. No question was made about his title, and it is not suggested that he was guilty of any concealment or suppression of the truth in regard to it. Under these circumstances, it would be bad faith on the part of the government, after getting possession of the steamer and getting it within its jurisdiction, under pretense of hiring it of the claimant, to set up that he had no title to it."
>
> Clark v. United States, 95 U. S., 539.

The RFC desired to have a decision in this case follow a final determination by the Interior Department. If the case is reversed, it may renew such desire. Such wishes should not prevail. To thwart such wishes is one purpose of the rule.

> "We think the principle, that the lessee cannot dispute the title of his lessor, also applies. We see nothing to take the case out of this long settled and

salutary rule * * *. The rule applies with peculiar force where the lessor was in possession, and transferred that possession upon his faith in the validity of the lease to the lessee * * *."

"According to the views upon which the judgment below was given, the lessee could not only refuse performance of all his covenants, but, at the end of the term, he could have held possession in defiance of his lessors, and he could have continued to hold possession until they showed a valid title in a suit brought to enforce it, or until such a title in such a suit was shown by some other party. This, we think, would be contrary alike to reason, justice, and the law."

Scott, et al., v. Rutherford, 92 U. S. 107;

Parrott v. Hungelberger, 9 Mont. 526; 24 Pac. 14;

Fiers v. Jacobson, Mont. Sup. Ct., Nov. 8, 1949; 211 Pac. 2nd 269.

The evidence shows that the taking of the plumbing, etc., from the buildings took place before August 28, 1946, and after February 28, 1946. Testimony of Nicely for RFC, 254 R. and Answer of RFC, 42 R.

"Defendant alleges that in April, 1945, all Defense Plant Corporation (Plancor) structures, equipment and facilities on the leased property (but not the Metals Reserve Company lease itself) were released by War Production Board, etc."

Answer RFC 41 R.

Nicely was working for RFC until September 1, 1946. 244 R.

All the acts of dismantling were admittedly done by some agency of the United States. The United States could have maintained a suit without joining as plaintiff

Metals Reserve Co., or RFC, against Mouats for any breach of the lease.

United States v. Shafner Iron & Steel Works (CCA 9th) 168 Fed. (2nd) 286. It would seem that the rule would work both ways, even if the evidence was not affirmative and uncontradicted that the acts complained of were done by RFC, and that by its answer it remained tenant in possession. At the close of the trial, Mouats moved for a Writ of Restitution. RFC opposed it. 256 R.

REPLACEMENT COST AS MEASURE OF DAMAGE

The following cases support Mouats' claim that the measure of damages for the strip and waste committed by RFC is in Montana the replacement cost.

McIntosh v. Hartford Fire Ins. Co., 106 Mont. 443; 78 Pac. (2nd) 82;

Evankovich v. Howard Pierce, Inc., 91 Mont. 344; 8 Pac. (2nd) 653;

Givens v. Markall, Cal. App.; 124 Pac. (2nd) 839.

Partly in order to pursuade the Court below to set at rest the question of value of replacement so that if Mouats' contention as to ownership is correct, the Court of Appeals could finally adjudicate, we moved the Court that a finding be made that the cost of replacement was $90,000, according to the testimony of Mr. St. John, a witness for RFC. The testimony of the Mouats on replacement was that it would cost above $160,000. If that was a waiver of any excess, and it was meant to have such effect, in order to get a final determination, it may

be considered such for the purpose of this appeal. Mr. St. John's evidence appears 261 R. The evidence of architects for the plaintiffs appears at 69 R. to 82 R.

LIABILITY OF PRESENT TENANT

T. A. D. Jones Co. v. Winchester Repeating Arms Co., 55 Fed. (2nd) 944.

This is to the effect the original lessee becomes a surety for the performance by its assignee of the obligation of its covenants. In Montana, a surety's liability is identical with that of the principal obligor.

CERTAIN STATUTES OF MONTANA

The attornment of a tenant to a stranger is void unless it is made with the consent of the landlord, or in consequence of a judgment of a court of competent jurisdiction. 7748 RCM, 1935.

> "When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of ten years from the termination of the tenancy, or, where there has been no written lease, until the expiration of ten years from the time of the last payment of rent, notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods prescribed in this section."
>
> 9023 RCM, 1935.
>
> RFC has no immunity as of sovereignty.
>
> RFC v. J. G. Menihan Corp., 312 U. S. 81.

Governmental functions exercised by RFC do not exceed those exercised by national banks.

State Tax Commissioner of Maryland v. Baltimore Bank, 169 Md. 65-180 A. 260, and appeal dismissed 296 U. S. 538.

SPECIFICATIONS 8, 9, 10, 11, 12

When Judge Pray announced in his opinion, that the upper Court might take a different view of the contract as to the ownership of the buildings, he himself frankly stated a condition of the record which made it quite desirable that he make findings of fact sufficient to enable the Court of Appeals to decide all questions pertaining to the proof of the fact by the findings without an examination of the record. Thus, if such finding had been made, the Court of Appeals would be in position to order the entry of final judgment if it sustained the plaintiffs' contention as to the law and the interpretation of the contract. We think that is the reason for Rule 52a that "The Court shall find facts specially."

However, the facts which Mouats requested to be specially found are undisputed, and are sustained as well by the testimony of RFC as by the testimony of the Mouats. If the law as to the ownership of the buildings as of date March 1st, 1946, is found by the Honorable, the Court of Appeals, to be as believed by the Mouats and their counsel, then we think the record is so plain as to the fact which the Mouats asked to be found that the Court of Appeals can and should order a judgment in favor of the Mouats in accord with the facts. We point out the testimony sustaining each of such facts.

Specification 9 is conclusively supported by the testimony of Nicely, 254 R.

Q. How much of the plumbing, wiring and other fixtures were removed from the leased property before the 1st of September, 1946, and after the 28th of February, 1946, I mean in that six months?

A. Well, you have it all there in a document you submitted as evidence, the number of lavatories, toilets, bath tubs, and so forth.

Q. What I wish to know is was it all of the plumbing, all of the wiring and all of the fixtures insofar as they have been removed, were they removed previous to August 28th, 1946?

A. That is right. 254 R.

Specification 10 is conclusively sustained by the evidence of Mr. St. John, a witness for RFC.

Q. Now, Mr. St. John, we will get to that restoration. What would it cost to restore that plumbing to those buildings and put it in the position wherein it was in March in 1946?

A. You mean the 22 houses?

Q. I mean all of them that are on the leased ground?

A. I would say roughly speaking, in the neighborhood of ninety or ninety-five thousand dollars. That is just roughly speaking. 275 R., 276 R.

Specification 11 is conclusively sustained:

Q. How many had they taken off prior to August 1st, 1946?

A. One. (Testimony of Nicely, 233 R.)

Q. And the balance of the 21 were removed after that date, I presume?

A. That is right. (233 R.)

However, the specification claims that the value of the buildings was $600.00. Mr. St. John for the RFC set it as of a value of $400.00.

In order to end the litigation, we hereby agree to the value asserted by Mr. St. John. His testimony is at 266 R.

Specification 12, as to the number of buildings removed, 21 houses, is conclusively sustained by the words of Nicely for RFC:

A. Yes, 22 removed. (252 R.)

The value in specification 12 is set at $700.00 each. For the purpose of a final determination of the litigation, we waive a valuation of $700.00 and agree to the Court of Appeals adopting the valuation of St. John, $400.00 each.

We respectfully submit that as to the parts of the judgment appealed from, judgment should be reversed, and the Court of Appeals should order judgment entered:

1. That the Mouats are the owners of all wooden buildings standing on the leased premises.

2. That they were the owners of all wooden buildings standing on the leased premises on March 1, 1946.

3. That they have judgment for the necessary costs of replacing the plumbing, wiring, doors, windows, oil storage tanks, and pipes appurtenant thereto, fixed by Mr. St. John at $90,000.00.

4. That they have judgment for the value of one house removed by defendant before September 1, 1946, $400.00.

5. That they have judgment for the value of twenty-one houses removed from the premises before suit was commenced, and after September 1st, 1946, at $400.00 each, $8,400.00.

Respectfully submitted,

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H. L. MAURY,

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Attorneys for Mouats.